Supreme Court, U.S.
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No. 98-1515

In The

Supreme Court of the United States

October Term, 1998

JULIA MILLION,

Petitioner,

v.

NICK VINCENT SALAS and
ANTHONY MICHELLE SLAYDEN,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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RESONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents, Nick Vincent Salas and Anthony Michelle Slayden, file this Respondents' Brief in Opposition ("Response") to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition"), asking the Court to deny the Petition to review the opinion issued December 21, 1998, by the United States Court of Appeals for the Fifth Circuit. In support of this request, Respondents respectfully show the Court as follows:

STATEMENT OF THE CASE

The Petitioner's statement of the proceedings below is grossly inaccurate as it fails to apprise the Court of crucial facts related to the questions presented to this Court for review.

The first question presented asserts lack of notice to the appealing party of the commencement of the time period for appeal. The Petitioner, however, admitted in the District Court proceeding that notice was given, however, Petitioner omits these facts in her Statement of the Case.

In the District Court proceeding, Petitioner admitted the following facts:

1. On May 28, 1997, the Bankruptcy Court issued its rulings from the bench. Counsel for both parties signed off on the judgment on June 16, 1997. (2 R. at 173).

2. On June 16, 1997, Petitioner's counsel was advised by Respondents' counsel that the judgment was being presented to the Court for signature at docket call on June 17, 1997. (1 R. at 24).

3. The judgment was presented to the Court by Respondents' counsel on June 17, 1997, and the Court forwarded it to the Clerk for entry. (2 R. at 173).

4. The Clerk entered the judgment the following day (June 18, 1997) *and forwarded a copy of the Order to counsel for both parties that same day.* (2 R. at 171).

5. The original of the judgment contains a Certificate of Service on the back, signed by a deputy clerk, certifying that a copy of the judgment was sent to counsel for the Debtor (Petitioner) on the same day the judgment was entered. Petitioner's counsel failed to submit this complete copy of the judgment when he submitted the record on appeal to the District Court. (Appellant's Response to Appellees' Motion to Correct the Record).

6. On July 1, 1997, 14 days after the entry of the judgment, and one day after the time for Notice of Appeal expired, Petitioner's counsel, *for the first time,* made inquiry of the Bankruptcy Clerk and Respondents' counsel regarding the judgment. (1 R. at 25). There is no evidence on the record that Petitioner or her counsel had any contact whatsoever with the Court prior to July 1, 1997.

7. Despite its untimeliness, Petitioner filed a Notice of Appeal on July 1, 1997. (1 R. at 4). In the Notice of appeal, Petitioner admits that the "Order was mailed to counsel by the Clerk's office on the 18th [of June] . . . " In

her response to the Motion to Dismiss in the District Court, Petitioner again admits that the Clerk timely mailed the notice to counsel for both parties. (1 R. at 25)

8. Once Petitioner learned of the entry of the judgment, she still had 19 days to file with the Bankruptcy Court a Motion for Extension of Time to file the Notice of appeal (Bankruptcy Rule 8002(c)), yet she chose not to do so.

All through the appeal in the District Court, Petitioner took the position that notice of the entered judgment was mailed to her by the Clerk on June 18, 1997, (the date the judgment appealed from was entered).

Not until her brief on appeal to the Fifth Circuit Court of Appeals did she change her position and assert that no notice was sent by the Clerk. The Fifth Circuit declined to consider the due process argument now before this Court because Petitioner failed to raise the issue in the District Court and because the Court was confident that no miscarriage of justice would result.

REASONS FOR DENYING THE WRIT

A. The Standards for Review Have Not Been Met by Petitioner.

The Petitioner requests this Court to review an issue which was not raised in the District Court, but instead was raised for the first time in a brief to the Court of Appeals. The Court of Appeals declined to consider the issue since it was not raised in the District Court and

because the Court was confident that no miscarriage of justice would result.

The Court should deny discretionary review in this matter pursuant to Supreme Court Rule 10.1 which states in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Court has held that the principal purpose for which the Court uses certiorari jurisdiction is to resolve conflicts among the circuit courts of appeal and state courts on the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). Petitioner's failure to satisfy this standard should necessarily result in the Court's denial of her Petition.

B. Notice Was Given and Therefore the Issue is Moot.

Question One:

Petitioner alleges that Bankruptcy Rule 8002(c) is unconstitutional because it denies due process because the appeal was denied because no notice of the commencement of the time required to appeal was given to the appealing party.

First, as shown in Respondents' Statement of Facts, notice was given of the commencement of the time period.

The Bankruptcy Clerk certified that a copy of the judgment was mailed to Petitioner's counsel on the date the judgment was entered. Furthermore, Petitioner, in her untimely Notice of Appeal to the District Court, admits that notice was mailed by the Clerk and she again admits this in her Response to the Motion to Dismiss the Appeal. Thus, there was no lack of notice and thus no denial of due process.

Second, Petitioner admits that she was given notice that the judgment was being presented to the Bankruptcy Judge for signature on June 17, 1997. In her brief to the court of appeals, Petitioner admits that her counsel was

aware of the timing and procedure of entry of an Order once signed. Thus, there was no lack of notice and thus no denial of due process.

Third, Bankruptcy Rule 8002 contains two safety components to further ensure due process:

1. A Notice of Appeal could be filed after the announcement of the decision but before the entry of the judgment and still be treated as filed after the entry of the decision and on the date thereof. Bankr. Rule 8002(a).

2. A request to extend the time for filing a Notice of Appeal could be made within twenty days after the expiration of the time for filing a Notice of Appeal, upon a showing of excusable neglect. Bankr. Rule 8002(c).

The Petitioner could have exercised either one of these options to safeguard her right to appeal, but she chose not to exercise either.

The cases cited by the Petitioner regarding lack of notice as a denial of due process are not on point. There were only two parties to the bankruptcy proceedings in issue, Petitioner and Respondents. Both parties were fully aware of the proceedings, actively participated therein, actively participated in the preparation of the form of the Final Judgment, and each was sent notice of the entry of the judgment.

In the cases cited by Petitioner, the parties who were denied due process were peripheral parties, not actively involved in the proceedings, and, in most cases, not even aware that any proceedings were pending. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950). The one notable exception, the

main case upon which Petitioner relies, is *City of New York v. New York, New Haven*, 344 U.S. 293, 97 L.Ed. 333 (1953). In that case, statutory "reasonable notice" was required and this Court held that notice by publication in newspapers of a claims bar date was not "reasonable notice" even though the creditor had actual knowledge of the bankruptcy. In the case at hand, however, the Petitioner had an overwhelming amount of notice. The Petitioner was aware of the Court's ruling, her counsel approved the form of the judgment, she was aware that the judgment was being presented to the Court on a date certain, she was aware that the entry of the Order routinely took place within a day or two of the signing of the Order, and she was sent notice of the entry of the judgment on the day it was entered. She also clearly had actual notice of the entry of the Order in time to request of the Bankruptcy Court an extension of time to file the Notice of Appeal. Therefore, Petitioner clearly had notice and no denial of due process occurred.

Question Two:

The Petitioner asserts that the constitutional issue of denial of due process was not raised until the District Court dismissed the appeal. The issue, however, was ripe when the Motion to Dismiss the appeal was filed. The issue of denial of due process, however, was not raised in the District Court because during those proceedings Petitioner admitted that the Clerk actually mailed a copy of the entered judgment to counsel for Petitioner on the date the judgment was entered.

In fact, the issue of denial of due process was not even raised as an issue in the Statement of Issues on

Appeal to the Court of Appeals. Instead, the issue was raised for the first time in the brief to the Court of Appeals. It was in the Court of Appeals brief that Petitioner for the very first time alleged that no notice was sent by the Clerk of the entry of the judgment (a dramatic change from Petitioner's District Court allegation that notice was sent by the Clerk but not received).

As Petitioner asserts in her brief, this Court has held in *Hormel v. Helvering*, 312 U.S. 552, 85 L.Ed. 1037, 61 S.Ct. 719 (1941), that:

> Ordinarily, an appellate court does not give consideration to issues not raised below . . . [P]arties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant; . . . it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

The argument of lack of due process due to lack of notice was brought into issue for the first time in the Court of Appeals. Prior to that time, notice was admitted.

The raising of the issue for the first time in the brief on appeal to the Court of Appeals deprived Respondents of the opportunity to introduce evidence of the Clerk's notice. In fact, after the issue was raised in the brief, Respondents attempted to obtain a stipulation by Petitioner of the Clerk's Certificate of Service affixed to the back of the judgment, but Petitioner refused to stipulate. Respondents filed a Motion to Correct the Record to

include the back of the judgment containing the Certificate of Service as part of the judgment. In response thereto, Petitioner admitted that the Certificate of Mailing was affixed to the judgment but objected to the correction of the record, stating that the Certificate of Mailing was "evidentiary", and since not offered to the District Court as evidence, it should not be offered to the Court of Appeals.

The raising of the issue for the first time in Petitioner's brief to the Court of Appeals denied Respondents the opportunity to offer all the evidence they believed relevant and thus would have prejudiced Respondents' case.

CONCLUSION

For these reasons, the Court should deny the Petition for Writ of Certiorari.

There is no constitutional issue to be decided in this case because Petitioner had notice and more than ample opportunity to be heard but failed to timely avail herself of this opportunity. In addition, the Court of Appeals properly declined to take up the constitutional argument because it was not raised in the District Court, thus depriving Respondents an opportunity to present evidence thereon, and because there was no miscarriage of justice by declining to do so. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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